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UNITED NATIONS

AT

Administrative Tribunal

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AT/DEC/695
21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 695

Cases No. 661: BURNETT
No. 662: FOURNIGAULT
No. 663: GIL
No. 664: LOPEZ
No. 665: NOGALES

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 29 April 1994, Luz Mariana Burnett, Fabienne Raymonde Fournigault, Maria Teresa Pilar Gil, Ingrid Lopez and Gemma Nogales, all of them staff members of the International Maritime Organization, hereinafter referred to as IMO, filed an application containing pleas requesting the Tribunal:

"(a) To rule that the Respondent has failed to implement Judgement No. 612 in a number of important respects;

(b) To reconfirm that all the Applicants and Interveners are entitled to the benefits of international recruitment status;

(c) To order the Respondent to define the administrative situation of the Applicants and Interveners in relation to their status as internationally recruited staff, thereby enabling them to avail themselves of their current entitlements;

(d) To order the Respondent to pay to them, without further delay and at current prices, all sums due in respect of past home leave entitlements for themselves and any other people entitled to travel

with them on home leave, irrespective of whether or not they actually went on holiday to their home countries at the dates when they would have been entitled to take home leave if their entitlement had been recognized at the time of their recruitment;

(e) To order the Respondent to reimburse them, under the education grant provisions, for documented educational expenses, making an adjustment for inflation;

(f) To rule that compensation is due to Applicants or Interveners who, on grounds of expense, did not incur educational costs in the past in respect of the education of their dependent children, but who would have done so if international recruitment status had been granted at their date of recruitment;

(g) To order the Respondent to pay to the Applicants and Interveners such additional sum as the Tribunal may deem appropriate to compensate them for the unconscionable delay in implementing the judgement and particularly for the distress caused to them by the Administration's suggestion that they might not be entitled to the benefits of international recruitment status which the Tribunal had ordered the Respondent to grant;

..."

Whereas the Respondent filed his answer on 29 September 1994;

Whereas the Applicants filed written observations on 23 May 1995 in which they stated that pleas (a), (b) and (c) were no longer relevant;

Whereas the Respondent submitted additional observations on 15 June 1995, on which the Applicants commented on 3 July 1995;

Whereas, on 4 July 1995, the Tribunal put questions to the Respondent to which he provided answers on 7 July 1995;

Whereas the facts in the case are as follows:

The Applicants and the Interveners, in a prior application to the Tribunal, challenged their status as "local recruits". In Judgement No. 612, issued on 1 July 1993, the Tribunal ordered the

Respondent "to grant [the Applicants] international recruitment status, together with corresponding benefits, with retroactive effect from the dates of their appointments," and ordered that "each of the Applicants should be paid the amounts which she has lost through inability to avail herself of the relevant benefits since appointment." This order also applied to the Interveners.

On 5 October 1993, the Director, Administrative Division, informed each of the Applicants as follows:

> "I write to advise you that, in the light of the decision of the UNAT concerning your recruitment status, the Administration regards your initial appointment as having been made on the basis of international recruitment status.
>
> Accordingly, the Administration will grant you the relevant benefits of such status, with retrospective effect from the date of your appointment, in accordance with the Staff Regulations and Staff Rules. No doubt you will be making the appropriate claims in respect of this change in your recruitment status for evaluation and settlement, to the Head of Personnel."

A Personnel Action Form, dated 14 October 1993, was issued for each Applicant indicating "change of status from local recruitment to international recruitment in accordance with UNAT Judgement No. 612." The forms gave no information on any amounts or adjustments due or paid. Under "remarks" it was noted "Further details to be given on a following Personnel Action form." In a memorandum dated 21 October 1993, the Director, Administrative Division, advised the Applicants that efforts were under way to "determine the methodology by which the retrospective entitlements will be determined and paid ..."

In a subsequent memorandum to the Applicants, dated 27 January 1994, the Director, Administrative Division, informed them that "the Administration has now finalized the special procedure and criteria to examine claims concerning entitlements deriving from this retroactive change of recruitment status." The memorandum further stated that (i) home leave benefits would be paid

on proof of expenses incurred by the Applicants in travelling to their home countries in the year of entitlement. If no proof of precise fares was available, the cost would be established by "using expenses incurred by staff members who travelled under similar home leave conditions to similar destinations, provided you can bring proof that the travel actually took place"; (ii) education expenses would be reimbursed "only on certification by the school that the child was in full-time attendance and confirmation that the fees were paid"; (iii) installation travel payment would be made only on the basis of evidence of expenses under the same conditions as home leave travel; and (iv) a non-resident's allowance could be claimed by staff recruited before 1 September 1983 who fulfilled the conditions set out in staff rule 103.2 for the payment of such allowance.

The Applicants were "to ascertain that your personal situation is such that you are entitled to the benefits which follow international recruitment. For instance, marriage to a person who would be considered as 'resident' (if appointed), or change of residential status to that of 'permanent resident in the UK', has always been considered in IMO and in other UN Agencies as leading to the loss of entitlements reserved to 'internationally recruited staff'."

On 1 March 1994, counsel to the Applicants wrote to the Director, Legal and External Relations Division, noting "the Applicants have not yet received any of the payments due to them and I consider the action taken to be totally inadequate to implement the judgement." He also noted the suggestion in the memorandum of 27 January 1994, that "the Applicants (or some of them) may not be entitled to the benefits of international recruitment," and the apparent intention to authorize payment for home leave only if such leave was taken and documentary evidence of travel could be provided, an approach he considered to be "totally incompatible with the judgement". Finally, he expressed concern over the intent of the Administration to let the Applicants "work out all aspects of their administrative situation for themselves and make appropriate

claims" suggesting "it is for the Administration to tell the Applicants what their administrative situation is and what their entitlements are in the light of the judgement."

In his reply dated 25 March 1994, the Director, Administrative Division, stated that: "The Administration has every intention of fulfilling its understanding of UNAT Judgement No. 612. I have written to each of the Applicants and Interveners, inviting them to come and see me, individually, so that we can help them in formulating their claims."

On 29 April 1994, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. In implementing Judgement 612, the Administration has drawn an unjustifiable distinction between international recruitment status and international recruitment benefits.

2. The calculation of benefits owed to the Applicants should be based on their retrospective entitlements, rather than on the basis of expenses actually incurred.

Whereas the Respondent's principal contentions are:

1. The Applicants have been granted international recruitment status. The Administration has implemented Judgement No. 612 in good faith and in compliance with the letter and spirit of the judgement.

2. The Applicants are not entitled to compensation for hypothetical entitlements or speculative losses.

3. The Applicants have suffered no damages whatsoever for alleged delay or distress. They are thus entitled to no compensation for any alleged delay or distress.

The Tribunal, having deliberated from 4 to 21 July 1995, now pronounces the following judgement:

I. The Applicants contend that there is a failure on the part of the Respondent to implement in full Judgement No. 612. They request that the Tribunal order immediate implementation of the Judgement and any other appropriate measures. The areas of contention are home leave and education grant.

II. In the matter of home leave, the Respondent's position is that the benefit is to be paid on proof that expenses were incurred in actual travel to the home leave destination in the year in which the Applicants would have been entitled to home leave.

The Applicants' submission is that this position is irreconcilable with the Judgement. They emphasize that the Judgement does not order the Respondent to reimburse them for fully-documented holidays which they might have taken in their home countries in the past. Instead it orders him to pay them the cost of all entitlements which they have lost in the past, through inability to avail themselves of them. It follows, therefore, the Applicants say, that the only documentation that can reasonably be requested of them is evidence of the existence of other people (spouse, dependent children) entitled in specific years of entitlement, to travel with them on home leave.

III. The Respondent's reaction to the Judgement falls far short of complying with its terms. It must be noted that the Tribunal ordered the Respondent to grant the Applicants "international recruitment status, together with the corresponding benefits, with retroactive effect from the dates of their appointments".

IV. The Applicants make the reasonable point that, if only those who actually travelled were to be paid now, this would penalize those who were not in a position to travel because of financial constraints.

In the Tribunal's view, the staff members who did not travel are entitled to the same compensation as those who did, as even those Applicants who did travel could not be considered to have been

on home leave, because of their lack of international recruitment status at that time. The Respondent's action highlights his failure to fulfil the retroactive requirement of the Tribunal's Judgement. All the Applicants must be compensated equally for the lack of entitlements.

V. Furthermore, to now pay the Applicants only the sums which they spent on travel at the time, or sums which they would have spent had they travelled, cannot be said to be just compensation for the loss. The Respondent would benefit undeservedly by making such payments now and the Applicants correspondingly would suffer because those sums would be of less value now than when, as expenses, they should properly have been incurred by the Administration at the relevant earlier times. The only manner in which to fully compensate the Applicants is to pay them sums which in today's values equate with the expenses which would have been incurred, had the Applicants had international recruitment status.

VI. The basis on which the Tribunal orders implementation of its Judgement renders unnecessary a discussion of the practical difficulties that would arise from the Respondent's proposals regarding proof of travel.

VII. With regard to the education grant, the Applicants accept that there is nothing intrinsically wrong in the Administration's regarding this as an entitlement which has to be claimed and calculated individually. In regard to those Applicants who did send their children to fee-charging schools, their entitlement is to reimbursement of the sums expended in accordance with the regulations in force at the time of expenditure, plus the interest which would have accumulated on such sums up to the date of reimbursement by the Respondent. These Applicants are entitled to payment of interest because if the education grant had been available to them, they would then have had the use of the funds

which they were forced to pay as fees. The Tribunal establishes the appropriate rate of interest to be paid at nine per cent.

There is only one case of a staff member who would have been entitled to the education grant but who did not send her children to a fee-paying school. This staff member, Mrs. Eldridge, whose intervention was admitted by the Tribunal in Judgement No. 612, could not afford to send her children to such schools, in the absence of an education grant, although she wished to do so.

The purpose of Judgement No. 612 was not only to rectify the question of status, but also to place the Applicants, and Interveners, in so far as it is possible, in the position in which they would have been, had they been internationally recruited. Because of her recruitment status, Mrs. Eldridge could not send her children to the type of school she preferred. Had she had her proper recruitment status, she would have availed herself of the education grant, which would have been paid by the Administration. She must be paid these sums now. Furthermore to give full effect to the Judgement, she must be paid not at the rate of the education grants as they were then, but rather at the current rate. In this way, equal and non-discriminatory treatment of all the staff members is effected.

VIII. The Tribunal, in making its orders, holds that the term "Applicants" includes both the Applicants and Interveners.

In summary, the Tribunal orders that:

(a) The Respondent pay to the Applicants all travel costs which they and their dependents would have been entitled to, had they been internationally recruited, such costs to be calculated at current rates.

(b) The Respondent reimburse the Applicants (with the exception of Mrs. Eldridge) the education grant benefits they would have been entitled to under the Staff Regulations and Rules, together with interest at a rate of nine per cent, accrued from the date of expenditure to the date of payment by the Respondent.

(c) The Respondent pay to Mrs. Eldridge the education grants she was entitled to, at the current rates set forth in the Staff Regulations and Rules.

The Tribunal makes no further order.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

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ADMINISTRATIVE TRIBUNAL

Judgement No. 696

Case No. 741: DE BRANDT-DIOSO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas at the request of Irma De Brandt-Dioso, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal to 30 June 1993;

Whereas on 17 June 1993, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 21 July 1993, after making the necessary corrections, the Applicant again filed an application containing pleas requesting the Tribunal to:

> "(1) Declare that the loss of Applicant's personal effects at Port-au-Prince occurred while she was operating within the scope of her official United Nations duties, and in consequence, that she is entitled to reasonable compensation for her loss;
>
> (2) Adopt in Applicant's case the ratio decidendi found in Judgement No. 259 (Hoppenbrouwer) (...) to the effect that the loss sustained by Applicant in the Hoppenbrouwer case was attributable to service;

(3) Find that there was no negligence in the conduct of Applicant prior to, during and after the theft of the money and ring as Applicant had taken all reasonable precautions to protect the said items;

(4) Rescind the decision of the Controller, of rejecting compensation for Applicant as there was no proof of negligence, and instead, decide that Applicant is/was entitled to compensation in accordance with para. 3(a)(iii) of ST/AI/149/Rev.3 ...

(5) Order Respondent to compensate Applicant for her loss, minus the amount recovered through her personal insurance;

(6) Waive the provision of ST/AI/149/Rev.3, para. 6(b)(x) which limits the maximum compensation in the case of loss of cash to $400.00, given the particular circumstances at the duty station ...;

(7) Fix an appropriate award of damages as compensation for pain and suffering sustained by Applicant as a result of Respondent's unjustifiable refusal to compensate her."

Whereas the Respondent filed his answer on 30 March 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 16 June 1975, as a Bilingual Clerk-Typist at the G-3 level, in the Office of Personnel Services. Her appointment was extended until 1 January 1976, when it was converted to probationary. With effect from 1 June 1977, the Applicant was granted a permanent appointment and promoted to the G-4 level. With effect from 1 January 1982, the Applicant was promoted to the G-5 level and her functional title was changed to Administrative Assistant. On 1 October 1985, she was promoted to the G-7 level and her functional title was changed to Personnel Assistant. From 23 June 1989 to 22 December 1989, the Applicant served with UNTAG in Namibia. From 18 October 1990 to 30 January 1991, she served with ONUVEH in Haiti.

According to the record, on 28 January 1991, the Applicant withdrew all the money in her account at a bank in Port-au-Prince, Haiti and cashed her mission subsistence allowance (MSA) cheques, in

anticipation of her departure from Haiti two days later. On the same day, the Applicant drove to a market area, with a local youth who accompanied her to purchase wrapping materials to ship her belongings. The Applicant stopped the car to let her passenger out to make the purchase. He left the door on the passenger's side unlocked. While the Applicant was in the vehicle, with the windows and doors closed, and the engine running, her handbag was taken from the passenger seat. Stolen from the handbag, which was found lying on the ground, was approximately US$ 4,000 cash and a gold signet ring.

On 6 March 1991, having returned to Headquarters, the Applicant wrote to the Executive Officer, Department of Administration and Management (DAM), claiming reimbursement for the cash stolen and compensation for the gold ring, which she valued at US$ 1,800. On 11 April 1991, the Chief, Finance and Programmes Unit (FPU), Executive Office, DAM, forwarded the claim to the Secretary of the Claims Board. On 28 June 1991, the Secretary informed the Chief, FPU, Executive Office, DAM, that on 19 June 1991 the Controller had approved the recommendation of the Board which had considered the claim, that compensation be denied. The reason for the denial was "that there was negligence on the part of the claimant and that this was a case of common theft."

In a memorandum dated 16 August 1991, the Applicant requested the Controller to reconsider the decision. She contended that "the Board did not properly take into account the local conditions and particular circumstances" of the theft. They were that only cash was generally accepted in the country, that no international bank transfers were permitted, and that cheques given by ONUVEH to its staff were negotiable only in Haiti. She was therefore forced to cash her ONUVEH cheques and close her account, which she did on the day of the theft.

In a reply dated 29 August 1991, the Deputy Controller informed the Applicant that she had requested the Secretary of the Claims Board to "ensure that your case is reviewed by the Board on the basis of the additional information provided". In two memoranda

dated 6 September 1991 and forwarded to the Deputy Controller by the Applicant on 9 September 1991, the former Chief Administrative Officer and the former Chief Civilian Personnel Officer, ONUVEH, in response to requests from the Applicant, confirmed that (a) the payment of MSA was made by checks which were negotiable only in Haiti and (b) that all ONUVEH international staff had been required to liquidate their bank accounts before leaving the country, as transfers of funds to banks in other countries were not possible.

In a letter dated 18 November 1991, the Secretary of the Claims Board communicated the decision of the Board, as approved by the Controller on 12 November 1991. He informed the Executive Officer, DAM, that the Board had considered the Applicant's claim "in the light of the statements made by ONUVEH Officers" but that it "had decided to recommend denial of the claim as in its opinion there was negligence on the part of the claimant and that it was a case of common theft." With regard to the ONUVEH procedures, "the Board could not find any new evidence of facts which would lead it to alter its previous recommendations."

In a letter dated 6 December 1991, the Applicant requested the Secretary-General to review the decision to reject her claim. On 6 February 1992, she lodged an appeal with the Joint Appeals Board (JAB). On 29 December 1992, the JAB adopted its report. Its considerations, conclusion and recommendation read, in part, as follows:

> "Considerations
>
> ...
>
> 28. ..., the Panel, noting that the Claims Board advises the official designated by the Secretary-General on the action to be taken on a claim for compensation, was of the view that the reasons given by the Claims Board for its recommendation on the Appellant's claim were sufficient for their purpose. The Panel further noted that the Appellant, after having been informed of the Board's initial unfavourable recommendation on her claim, had had the opportunity to place before the Board all her arguments as to why this recommendation should be revised. Finally, the Panel was of the opinion that due process did not require staff-management participation in an

advisory body such as the Claims Board, given that staff members who felt aggrieved by a decision taken on the advice of the Claims Board could appeal, as the Appellant had done, to the Joint Appeals Board which did have staff-management participation. For these reasons, the Panel could not accept the Appellant's procedural arguments.

29. Turning to the substance of the appeal, the Panel noted that, in accordance with staff rule 106.5, staff members shall be entitled, within the limits and under the terms and conditions established by the Secretary-General, to reasonable compensation in the event of loss of their personal effects, determined to be directly attributable to the performance of official duties. The Panel further noted that the terms and conditions referred to in the above staff rule were set forth in ST/AI/149/Rev.3. Paragraph 3(a) of that instruction provides that loss of personal effects of a staff member should be deemed to be directly attributable to the performance of official duties when such loss:

> '(i) Resulted as a natural incident of performing official duties on behalf of the United Nations; or
>
> (ii) Was directly due to the presence of the staff member, in accordance with an assignment by the United Nations, in an area involving special hazards and occurred as a result of such hazards; or
>
> (iii) Occurred as a direct result of travelling by means of transportation furnished by or at the expense or direction of the United Nations in connection with the performance of official duties.'

30. With respect to paragraph 3(a)(i) above, the Panel was of the view that the Appellant's loss had clearly not resulted as a natural incident of performing official duties. As for paragraph 3(a)(iii), in the Panel's opinion, the loss had equally clearly not occurred as a direct result of travelling by means of transportation furnished by or at the expense or direction of the United Nations. As for paragraph 3(a)(ii), the Panel seriously doubted that the loss could be said to have been directly due to the presence of the Appellant, in accordance with an assignment, in an area involving special hazards and that it had occurred as a result of such hazards. ...

31. The Panel noted that, even if ... the Appellant's loss were deemed to be directly attributable to the performance of official duties, compensation would nevertheless be precluded ... if the loss was occasioned by her negligence. After thoroughly considering the circumstances of the Appellant's

loss as described by herself, the Panel concluded that indeed her loss was occasioned by her negligence. ...

...

Conclusion and recommendation

...

34. The Panel therefore recommends that no action be taken on the appeal."

On 4 January 1993, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed her that the Secretary-General "has decided, in accordance with the Board's recommendation, to maintain the contested decision and to take no further action on your case."

On 21 July 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's entitlement to compensation is governed by staff rule 106.5 and administrative instruction ST/AI/149/Rev.3, which provide that losses directly attributable to the performance of official duties are compensable, including losses due to the presence of a staff member on assignment in an area involving special hazards. The Applicant was preparing for her departure from Haiti, which constitutes an official duty, when the theft occurred.

2. The Applicant's case is similar to the Hoppenbrouwer case (Judgement No. 259 (1980)), and could not, in accordance with the holding in this care, be classified as "negligence." The Applicant was watchful of any possible theft, and her failure to prevent the theft could have happened to the most vigilant staff member.

3. The Claims Board procedures do not provide for due process as the Claims Board does not constitute an independent and impartial tribunal; the Applicant should have been given an

opportunity to comment on the Respondent's observations before the Claims Board; and the Claims Board should have given a reasoned decision on the Applicant's claim.

Whereas the Respondent's principal contentions are:

1. The Applicant has failed to prove that her loss falls under the relevant staff rule and administrative instruction which provide for compensation for the loss of personal effects.

2. The Applicant's negligence precludes any entitlement to compensation.

3. No issues of procedural fairness exist which would vitiate the Secretary-General's decision to accept the recommendation of the Claims Board not to compensate the Applicant.

The Tribunal, having deliberated from 3 to 21 July 1995, now pronounces the following judgement:

I. The Tribunal recalls that consideration of this application was postponed at the Applicant's request so that she could have an opportunity to file written observations on the Respondent's answer. The Tribunal notes that no written observations were filed within the time-limits and therefore proceeds to consideration of the application.

II. The Applicant commenced employment with the Organization in 1975. From October 1990 to the end of January 1991, she was assigned to the United Nations Observer Group for the Verification of Elections in Haiti (ONUVEH). Towards the end of her assignment, on 28 January 1991, the Applicant withdrew, in cash, the balance of her account with a bank in Haiti. She also cashed her last mission subsistence allowance (MSA) cheques. Around 3:00 p.m., she parked the ONUVEH car which she was driving, with the engine running, in a busy market area, in Port-au-Prince. A local youth who accompanied her went to fetch wrapping materials, but apparently failed to lock

the passenger door when he left the vehicle. The doors of the car were closed, the windows up. The Applicant's handbag was placed near her on the passenger's seat. While she sat there, someone very quietly opened the door and stole her bag. The Applicant immediately left the car to seek information regarding the theft from bystanders. On the way to find a policeman she found her bag, but it was empty. The Applicant filed a theft report, declaring the following items to be missing:

- Approximately $3,900 - $4,000 in US currency;
- Approximately 2,000 Haitian gourdes;
- 18 carat gold man's signet ring (with a value of approximately $US 1,800).

III. After returning to Headquarters, the Applicant filed a claim for reimbursement of her loss with the UN Headquarters Claims Board, but was denied compensation on the ground that "... there was negligence on the part of the claimant and that this was a case of common theft." The issue before the Tribunal is whether the Applicant's terms of employment were breached by the refusal of the Secretary-General to reimburse her for the loss of cash and jewellery.

IV. The Applicant requests (1) rescission of the decision of the Respondent on the grounds that she was operating within the scope of her official duties and that there was no contributory negligence on her part; (2) waiver of the limit set forth in ST/AI/149/Rev.3, which provides that the maximum compensation for loss of cash is $400; (3) a determination that she was denied due process before the UN Claims Board; and (4) an award of damages to be fixed as compensation for pain and suffering sustained by her as a result of the Respondent's unjustifiable refusal to compensate her.

V. The Applicant's first argument is predicated on two points: She was on official business and she was not negligent when conducting it.

She bases her entitlement to compensation on staff rule 106.5 which states:

> "Staff members shall be entitled, within the limits and under terms and conditions established by the Secretary-General, to reasonable compensation in the event of loss or damage to their personal effects determined to be directly attributable to the performance of official duties on behalf of the United Nations."

Administrative instruction ST/AI/149/Rev.3, issued to implement this rule, states, inter alia:

> "3. (a) Without restricting the generality of the rule, loss of or damage to the personal effects of a staff member shall be deemed to be directly attributable to the performance of official duties when such loss or damage:
>
> ...
>
> (ii) Was directly due to the presence of the staff member, in accordance with an assignment by the United Nations, in an area involving special hazards and occurred as a result of such hazards;
> ...
>
> ...
>
> (b) No compensation shall be paid for any loss or damage which was occasioned by the negligence or misconduct of the claimant."

VI. The Tribunal will deal first with the question of whether the Applicant was acting within the scope of her official duties at the time of the loss. In particular, the Tribunal will examine whether there were special hazards attached to this assignment which would cause the loss to be deemed directly attributable to the performance of official duties.

It is not in dispute that when the theft occurred the Applicant was using an official ONUVEH vehicle for a purpose that was sanctioned by the Organization. She was in the process of making final travel arrangements to leave the duty station after having closed her local bank account and cashed her last MSA cheques

in accordance with ONUVEH established practice. The necessity for this procedure was subsequently confirmed by the then Chief Administrative Officer, ONUVEH, in a communication dated 6 September 1991, which stated in part:

> "I can confirm that most hotels, art shops and travel agencies in Haiti generally accepted only payments in cash, and usually in US dollars. Mission subsistence allowance payments were made by cheques drawn on CITIBANK, Haiti and were negotiable only in Haiti. In addition, those personnel who opened US dollar accounts with the same bank were required to liquidate those accounts prior to departure from Haiti as direct transfers of funds to banks in other countries were not possible." (Emphasis added).

VII. The financial arrangement set up by the UN for staff members assigned to Haiti required them to close their bank accounts before leaving. Consequently, the Tribunal is satisfied that, in the circumstances of this case, it was appropriate for the Applicant to be carrying a substantial amount of cash at the time of the theft, which she would otherwise not have been carrying.

The Tribunal considers that the steps undertaken by the Applicant at the time of the theft resulted from her being assigned to Haiti. Hence, those steps were taken in connection with official duties. The Claims Board, in its recommendations, did not take sufficiently into consideration local conditions and special circumstances which placed the Applicant at a greater than normal risk.

The Respondent maintains that no special circumstances existed in Haiti and that the robbery was a matter of common theft. However, the Organization, in the ONUVEH Notes for Guidance of Election Observers, dated 23 October 1990, appears to consider that staff assigned to Haiti should exercise great caution during their stay. This indicates that this assignment was in an area involving special hazards. Paragraph 73 states:

> "Election Observers are advised not only to take all possible precautions against loss or theft of their personal property but to avoid having with them in the area expensive

> cameras, watches, radios or similar items, or large amounts of cash or travellers cheques."

VIII. The Tribunal agrees with the Applicant's contention that her case is similar to that of Hoppenbrouwer (Judgement No. 259 (1980) inasmuch as her loss is not comparable to losses from thefts suffered by staff members residing in New York. In that case, one of the principal contentions of the Applicant, who succeeded in his claim for reimbursement caused by theft, was that:

> "There is an obvious difference between the risks of day-to-day living and a loss sustained at an out-of-the-way place where a staff member has no business except in the line of duty."

Indeed, the then Chief Administrative Officer, ONUVEH, stated that the Applicant had suffered the loss "as a result of theft while being in a risky UN mission area."

IX. The Tribunal now turns to the question of whether the Applicant was negligent and whether she is precluded from any entitlement to compensation due to her negligence.

At the time of the theft, the Applicant was sitting in the car with the doors closed and the engine running. Her handbag was placed near her on the passenger seat. The Applicant claims that the Respondent has failed to make a case for negligence for at all times she remained in full control of the vehicle from which the theft occurred and was watchful of any possible theft. The Tribunal is of the view that the Applicant should have been more vigilant. Knowing that she was carrying a substantial amount of cash with her, she should have been more sensitive to her surroundings and made sure that once the local youth who accompanied her had left the car, the door was firmly locked. Therefore, the Tribunal believes that the Applicant was partly at fault for her loss, but, under the circumstances, it does not necessarily follow that she should be precluded from obtaining any compensation.

X. With respect to the Applicant's claim that there was a failure of due process before the Claims Board, the Tribunal rejects the Applicant's contention and agrees with the reasoning of the JAB, which considered that the requirements for a judicial hearing were not applicable to a body such as the Claims Board and that its procedures did not violate due process.

With regard to the loss of the jewellery, the Applicant is not entitled to any compensation as the administrative instruction ST/AI/149/Rev.3 plainly bars such a recovery. There is no claim cognizable thereunder, as there was no reason for the Applicant to be carrying jewellery in her purse. The Applicant also asks that the provision of administrative instruction ST/AI/149/Rev.3, paragraph 6(b)(x), which limits compensation for loss of cash to $400, be waived. The Tribunal's view is that, due to the particular circumstances at the duty station and the special provisions regarding financial arrangements for staff assigned to Haiti, consideration should be given by the Respondent to waiver of the $400 limit on reimbursement for cash, taking into account that the Applicant has already received some money from her insurance company.

XI. The Tribunal concludes that the Applicant is not entitled to full compensation for her loss. However, due to the particular circumstances at the duty station necessitating carrying a relatively large amount of cash, the Tribunal decides to remand the case to the Claims Board to consider whether it would be appropriate to recommend that the Organization share, in a reasonable proportion, with the Applicant, the loss of cash, taking into account the amount she received from the insurance company.

XII. In view of the foregoing, the Tribunal orders the case to be remanded to the Claims Board, as set forth in paragraph XI above.

All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 21 July 1995

B. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/697
21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 697

Case No. 772: ABD ELAL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero; Mr. Mikuin Leliel Balanda;

Whereas at the request of Nabil M. Abd Elal, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 December 1993;

Whereas, on 21 December 1993, the Applicant filed an application requesting the Tribunal, inter alia:

"(a) To rescind the decision of the Secretary-General accepting the recommendation of the Joint Appeals Board rejecting the Applicant's appeal;

(b) To find and rule that the Joint Appeals Board erred as a matter of law, in substance and procedure by rejecting the Applicant's appeal;

(c) To find and rule further that the Applicant was harmed by the Respondent's actions in failing to safeguard his rights to a fair and impartial evaluation and thus forcing him to rebut his first three PERs which in turn lead to a delay of his promotion by three years compared to his colleagues;

(d) To award the Applicant appropriate compensation to be fixed at a two year P-4 full salary for the actual, consequential and moral damage sustained as

a result of the Respondent's actions or lack thereof and to make this determination pursuant to article 9, paragraph 1 of the Statute and Rules;

(e) To order that the Applicant's promotion to P-4 be made retroactive by the nine months prayed for in the Applicant's initial complaint."

Whereas the Respondent filed his answer on 8 April 1994;

Whereas the Applicant filed written observations on 16 September 1994;

Whereas, on 16 June 1995, the Applicant submitted further documents and on 19 July 1995, the Respondent submitted his comments thereon;

Whereas, on 12 July 1995, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 30 October 1982, as an Interpreter Trainee in the Department of Conference Services (DCS), Interpretation and Meetings Division, Interpretation Service/Arabic, on a three month fixed-term appointment at the P-1, step II level. His appointment was extended for two three-month periods, through 1 August 1983, when the Applicant was granted a probationary appointment and promoted to the P-2 level, as an Associate Interpreter. With effect from 1 July 1986, he was granted a permanent appointment, at the P-3 level, as an Interpreter. The Applicant was promoted to the P-4 level, with effect from 1 July 1991.

On 19 November 1990, the Applicant applied for a P-4 post of Interpreter (Arabic). On 13 March 1991, he was informed by a Recruitment and Placement Officer, Office of Human Resources Management (OHRM), that he had been selected for the post. In a memorandum of the same date, the Recruitment and Placement Officer informed the Executive Officer, DCS, that the Applicant had been

selected for the post and that "the earliest possible effective date of this assignment ... shall be the date on which the APB [Appointment and Promotion Board] short-listed the candidates, namely, 19 December 1990. ... If the staff members are already performing their new functions, this will be the effective date of their assignment. If the staff members are not yet performing their new functions, the effective date will be the date on which they commence their duties." A Personnel Action form (P.5), issued on 3 April 1991, indicated that the Applicant had been assigned to higher level functions with effect from 19 December 1990.

In a memorandum to the Assistant Secretary-General, OHRM, dated 3 May 1991, the Applicant and another staff member selected for a higher level post noted that a colleague in their same situation had been exceptionally granted a promotion with retroactivity. They stated "we deem it unfair that ... we are denied similar privileges" and requested that their promotions be implemented retroactively for a period of nine months. This memorandum was forwarded on 31 May 1991 to the Executive Officer, DCS, for comment. On 7 August 1991, DCS recommended the Applicant for promotion to the P-4 level and certified that the Applicant had performed the higher-level functions satisfactorily for six months following his assignment to the P-4 post.

In a memorandum dated 1 October 1991, a Personnel Officer, OHRM, noted that "DCS has recommended the promotion of the two staff members to take effect six months from the date of their assumption of higher level functions, i.e., on 1 July 1991." She stated that OHRM's review of this recommendation was "pending DCS' comments on the request of the staff members for retroactive promotion to the P-4 level."

According to the record, on 11 February 1992, having received no response from DCS to several reminders, OHRM processed the promotion of the Applicant to the P-4 level, with effect from 1 July 1991. In a memorandum to the Assistant Secretary-General, OHRM, dated 6 March 1992, the Applicant and another staff member

complained that OHRM had implemented the contested promotion "without, in any way, considering our request for retroactivity." In a memorandum to a Personnel Officer, OHRM, dated 19 March 1992, the Executive Officer, DCS, indicated that DCS "would like to support the staff members' request for retroactivity of their promotion to P-4." In a reply dated 31 March 1992, the Personnel Officer requested clarification "since the actions taken by DCS until your memorandum of 19 March 1992 do not accord with your statement that the staff members' request is supported by DCS."

In a memorandum to the Assistant Secretary-General, OHRM, dated 19 May 1992, the Applicant and another staff member again requested the Assistant Secretary-General to implement their promotions retroactively. In a memorandum dated 11 August 1992, the Acting Chief of Staff Administration and Monitoring Service, OHRM, advised the Applicant and his colleague that they had not been assigned P-4 functions until 19 December 1990. Therefore, their promotion to the P-4 level with effect from 1 July 1991, six months from the date of assumption of the higher level functions, was in accordance with the rules.

On 8 October 1992, the Applicant requested an administrative review of this decision. On 11 December 1992, he lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 22 June 1993. Its considerations, conclusions and recommendations read, inter alia, as follows:

> "28. The Panel noted that, based on ST/AI/338/Add.2, the retroactive implementation of a staff member's promotion should depend, in each case, on the date from which the staff member concerned has performed the full functions of the higher-level post. The Panel, however, observed that it was within the authority of the Secretary-General to grant a waiver of the time required in the above-mentioned rule, in case of exceptional circumstances. The Panel, therefore, accepted the Respondent's explanation that the reason for the retroactive implementation of the promotion of the staff members mentioned by the Appellant was that they had been performing duties, for a considerable length of time, at the P-4 level prior to their selection to the P-4 posts.

29. The Panel considered whether any exceptional circumstances were present which would have warranted the granting of an exception to the Appellant. The Panel felt that an exception could be granted only on the grounds that the Appellant had been performing at the P-4 level prior to his selection for the P-4 post. ...

30. The Panel felt that the line between assignments performed by a P-3 level and a P-4 level is very thin. It seemed to the Panel that whenever an interpreter was performing a P-3 or a P-4 level assignment, it was based merely on the amount of confidence and trust given him by his supervisor as indicated by the nature of the interpreter's assignment.

31. Based on the above, the Panel found that it was not within its competence to evaluate the level of the assignments the Appellant performed prior to his selection for the post in question.

32. ... The Panel also noted that DCS had maintained that the Appellant was assigned to the P-4 post on 19 December 1990 and not prior thereto.

33. The Panel took note of the memorandum dated 13 March 1991, from [the Recruitment and Placement Officer, OHRM] to [the Executive Officer, DCS], which referred inter alia, to the effective date on which the Appellant started to perform at a higher level: 'For administrative purposes, the earliest possible effective date of this assignment to a higher level post shall be the date on which the APB short-listed the candidates, namely, 19 December 1990.' (...) The Panel found no reason to change this date.

Conclusions and recommendations

34. The Panel did not concur with the view of the Appellant that the decision not to implement retroactively his promotion from P-3 to P-4 constituted a violation of Appellant's rights.

35. Accordingly, the Panel recommends that the appeal be rejected."

On 15 July 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised him that the Secretary-General had "approved the recommendations of the Board ... [and] decided to reject your appeal and to take no further action on your case."

On 21 December 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was subjected to irregular procedures and was a victim of discrimination and prejudice, which has led to an unfair loss of seniority compared with his colleagues.

2. The JAB erroneously concluded that the Applicant was not performing the higher-level P-4 duties prior to the effective date of his promotion.

Whereas the Respondent's principal contentions are:

1. The effective date of the Applicant's promotion was in accord with the promotion procedures applicable at that time.

2. There is no credible evidence that the decision under appeal was motivated by prejudice or any other improper motive.

The Tribunal, having deliberated from 28 June to 21 July 1995, now pronounces the following judgement:

I. On 19 November 1990, the Applicant, then a staff member at the P-3 level, applied for a P-4 post that had been advertised under the Vacancy Management System in force at the time. His application was considered by the Appointment and Promotion Board (APB) and subsequently he was selected to fill the post.

Having been selected, he was subject to the provisions of ST/AI/338/Add.2 which stipulates that "staff members who have been selected ... for a post one level higher than their present level may have their promotion implemented as of the beginning of the seventh month after the staff member has assumed the full functions of the higher-level post".

II. On 13 March 1991, the Recruitment and Placement Officer, Professional Staffing Service, OHRM, informed the Executive Officer, Department of Conference Services (DCS), that the six-month period required by ST/AI/338/Add.2 was to be counted from 19 December 1990, at the earliest, i.e. the date on which the staff member had been placed on the short list by the APB. This date was established pursuant to the memorandum of the Assistant Secretary-General for OHRM dated 8 September 1990, to the Chairman, APB, on "Promotion under the Vacancy Management and Staff Redeployment Programme", according to which "[if] the staff members are already performing their new functions, this will be the effective date of their assignment. If the staff members are not yet performing their new functions, the effective date will be the date on which they commence their duties".

III. The Applicant challenged this decision, arguing that other staff members appointed to P-4 posts had been promoted to the P-4 level retroactively, while he had to wait for six months. He claimed that he was discriminated against. He further submitted that there was practically no difference between the duties performed by an interpreter at the P-4 level and those performed at the P-3 level and that, therefore, the criterion used by the Administration to grant or to deny retroactivity was unfounded.

IV. The Administration, on its part, while admitting that the duties performed by an interpreter were basically a single function regardless of the grade, maintained that, nevertheless, a difference arose when the importance of the various meetings serviced by the interpreters was considered. Thus, duties of a more responsible nature, such as those performed at the meetings of certain bodies, were considered to be at the P-4 level. To this, the Applicant answered by submitting a list of the meetings he had serviced, which included several meetings of the Security Council. This was not

considered sufficient by the Administration, which alleged that, occasionally, P-3 staff members had to service such meetings, due to shortage of personnel.

V. The Tribunal, therefore, had to determine:

(a) What were the rights of the Applicant as far as the implementation of his promotion to the P-4 level was concerned;

(b) Whether the criterion used by the Administration to establish the commencement of the six month period required by ST/AI/338/Add.2 for promotion to a higher level violated such rights;

(c) Whether the Administration violated the staff member's rights by grading the function of interpreting at different levels, according to the nature and importance of the meeting at which it was performed;

(d) Whether the Applicant performed at the P-4 level prior to his promotion, making him eligible for a retroactive promotion;

(e) Whether the Applicant was discriminated against by the retroactive promotions granted to other staff members.

VI. In this respect, the Tribunal finds:

(a) That the Applicant's rights, as far as his promotion to the P-4 level is concerned were, as provided by ST/AI/338/Add.2, to be promoted after a six-month period "subject to the department or office submitting to OHRM a memorandum certifying satisfactory performance by the staff member of the functions of the higher-level post".

There are no provisions contemplating a waiver of such requirements. Therefore, the six-month period is applicable to all staff members selected for a post classified at a level higher than their level at the time.

(b) When determining the date from which the six months were to be counted, the Administration decided that in the case of those staff members already performing at the P-4 level, it was the date

on which they began to perform at that level. For those staff members "that are not yet performing their new functions the effective date will be the date on which they commence their duties".

The Tribunal is of the view that this distinction in no way contradicts or is inconsistent with the provisions of ST/AI/338/Add.2. Nor is there a possibility of waiving the six-month requirement in a way that would establish an undue privilege in favour of certain staff members to the detriment of others. The six-month period is respected and is applied to all staff members promoted to the P-4 level, in order to ascertain that the staff member selected for a higher level post can perform satisfactorily at such level. It is therefore logical that for those who have already been performing at the higher level, the six-month period should commence when they began performing at such level. It is from that moment that they can demonstrate their proficiency at the new level.

(c) Since the duties performed by an interpreter at both the P-3 or P-4 levels are similar, a criterion had to be established to distinguish between the two categories. The Administration decided that interpretation at particularly high level or sensitive meetings was a P-4 level function while interpretation conducted in different circumstances, at a lower level of responsibility, was a P-3 level function. The Tribunal finds no fault with this criterion. It contradicts no rule or regulation and is not arbitrary as it is based on the increased degree of accuracy required by the special nature of some meetings.

(d) The Administration found that the Applicant's performance only met the requirements of the P-4 level in the latter part of 1990. The Applicant challenged this finding and submitted a list of assignments that showed he had serviced several high level meetings. In the view of the Tribunal, it is up to the Administration to assess whether the Applicant had performed duties

considered at the P-4 level in a manner that would warrant beginning the six-month period earlier than the date of selection for the new post.

Only if it could be proved that the Administration acted arbitrarily and refused to recognize services that would clearly show that the staff member regularly performed at the P-4 level, could the Administration's decision be questioned. This is not the case in the present instance. The list of assignments submitted by the Applicant shows that the Applicant did not perform regularly at the P-4 level. Thus, the decision of the Administration cannot be successfully challenged. The Applicant claims that his performance evaluation report (PER) was altered by shortening the period it covered in order to exclude some P-4 level functions. The Tribunal notes that the functions mentioned, even if they had been covered by the PER, would not have altered the Applicant's possibility to obtain a retroactive promotion. Those functions were performed in February 1991 and only P-4 functions carried out prior to the selection for the new post, i.e. December 1990, would have been relevant for implementing the promotion retroactively.

(e) Discrimination against the Applicant has not been proven. The Respondent stated in his submission to the JAB that "in each of the cases cited by the Applicant, the Department of Conference Services certified that the staff members were performing at the P-4 level prior to their selection to the P-4 level post". The Applicant does not dispute this fact. He merely claims that he also had been performing at the P-4 level and should have been treated accordingly. In order to successfully claim discrimination, the Applicant would have to establish that his situation was identical to that of those staff members who were promoted retroactively. In the view of the Tribunal, the Applicant has failed to do so.

VII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/698
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 698

Case No. 748: HUDA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 9 September and 11 October 1992, 11 February 1993 and 17 May 1993, Kazi Tamjidul Huda, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 17 May 1993, the Applicant, after making the necessary corrections, again filed an application containing pleas requesting the Tribunal:

> "1. To declare that the Applicant is NOT LIABLE for the charges contained in the letter written by the Resident Representative, UNDP, Bangladesh dated 14 April, 1991.
>
> 2. To declare that the Administrator, UNDP, has committed a serious error of fact and law apparent on the face of the record thereby rendering his decision null and void.
>
> 3. To declare that the decision of the Administrator, UNDP is flawed by gross/substantive miscarriage of justice.
>
> 4. To pass an order or take such measures as would (i) reinstate the Applicant [in the position] he occupied prior to his wrongful separation from service; and at the same time

(ii) compensate the Applicant for a sum equivalent to US$217,000 (U.S. dollars two hundred and seventeen thousand only) for loss already suffered.

5. In the alternative to pass such an order or take such measures (i) to appoint the Applicant to a position outside Bangladesh which would be equivalent to the position which would be due to the Applicant had he not wrongfully been separated from service; (ii) [to] compensate the Applicant for a sum equivalent to US$217,000 (U.S. dollars two hundred and seventeen thousand only) for loss already suffered.

6. That, in the further alternative, the Administrative Tribunal of the United Nations take such measures or pass such orders as would adequately compensate the Applicant for a sum equivalent to US dollars $2,013,000 (U.S. dollars two million thirteen thousand only).

..."

Whereas the Respondent filed his answer on 22 November 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the World Food Programme (WFP) on 1 August 1977, as a Field Officer in Bangladesh, on a fixed-term appointment of three months. He served on further fixed-term appointments until 1 November 1986, when he was promoted to Senior Field Officer and granted a probationary appointment. On 1 May 1987, his appointment became permanent. On 12 July 1992, the Applicant was separated from service on grounds of misconduct.

According to the record, on 20 March 1991, in a telephone conversation with officials of the WFP Operations Division, the District Relief and Rehabilitation Officer (DRRO), Faridpur, complained about the Applicant's activities in Faridpur. On 24 March 1991, the WFP Director of Operations requested the Head of the Coordination and Programming Unit (CPU), Food for Work Project (FFW), WFP, Dhaka to conduct a preliminary investigation. On 8 April 1991, the Head of CPU, FFW submitted an Inquiry Report to the Director of Operations. The report found, inter alia, that the Applicant had taken bribes in 1989 and 1991 during visits to

Faridpur, that he had "misbehaved" during his 1989 visit and had "wasted WFP time and resources." It also found that he had "threatened to cancel [the] next year's FFW allocation ..." Statements from three Project Implementation Officers (PIOs) affirming that they had given money to the Applicant were attached to the report.

On 14 April 1991, the UNDP Resident Representative informed the Applicant that "serious allegations" had been made against him which "if confirmed by an enquiry would constitute a serious case of misconduct." He also informed the Applicant that "three PIOs in different statements made in the presence of DRRO ... are charging you of having extracted money from them in 1989 and 1991 under the threat of cancelling ongoing schemes or future ones." He requested the Applicant "to give your version of the matter, to suggest other persons from whom enquiry might be made and to call witnesses if you so wish." At the same time, he suspended the Applicant from duty until further notice.

Also on 14 April 1991, the UNDP Resident Representative appointed a Commission of Enquiry "to investigate accusations of serious misconduct" against the Applicant. The Commission consisted of the Deputy Resident Representative, a UNDP Programme Officer, an Associate Programme Officer, a Senior Programme Officer and a Project Officer from WFP. In a cable of the same date, the Resident Representative informed the Director, Division of Personnel, UNDP, of the allegations that had been made and that he had set up a Commission of Enquiry to investigate them.

In a Note for the Record, dated 27 April 1991, two members of the Commission of Enquiry recorded a visit they had made to Faridpur on 25 April 1991, having been informed that "some pressure was being brought to bear" on the three PIOs who had made statements against the Applicant. They noted that the three PIOs "re-confirmed their earlier written statements to be true," although one of the three PIOs "stated that he would like to withdraw his statement." When

questioned, he stated that he had been told by other PIOs that he should not have made the statement and should withdraw it because the Applicant was "the only person in WFP who is supporting FFW programme to remain with the Ministry of Relief and the PIOs." All three PIOs said they had made the statements "on the understanding that the contents will be known only to DRRO Faridpur and to WFP office". They "expressed their concern that these have been leaked to others including some people in the Directorate of Relief which might have bearing on their jobs."

According to the record, on 29 April 1991, the PIO, Madhukhali, one of the three PIOs who had made statements against the Applicant, met with three members of the Commission of Enquiry. He confirmed the contents of the statement he had made earlier on the Applicant's acceptance of money, but he asked to withdraw the statement as he had been under the impression that it had not been intended to be used as a complaint or accusation against anyone. He was reportedly "visibly worried about any future impact that such a statement may have on his job situation and any harassment/ inconveniences that he may be subjected to in future."

In a letter to the Resident Representative, UNDP, dated 29 April 1991, the Applicant responded to the charges against him, denying any "misbehaviour" in 1989 and noting that any complaints about his behaviour should have been made earlier. With regard to the three PIO statements, he asserted "these statements appear to have been collected deliberately." He noted as "a very striking feature of all the three statements" that they were all of the same date and that "the entire process was systematically conducted ... on the same day." The Applicant also suggested that the Commission contact several colleagues and former supervisors whom he named.

In a letter dated 30 April 1991, the Deputy Resident Representative, as Chairman of the Commission of Enquiry, requested the Applicant to meet with the Commission, "to enable the Commission to interview you in person on the charges as well as allow you to

present the case from your point of view." In a reply dated 2 May 1991, the Applicant expressed "reservations regarding the Commission." He noted that the Commission included an Associate Programme Officer junior to him and questioned whether this was appropriate. He also questioned the inclusion of three members of the Commission from WFP, the agency which had brought the charges against him. He requested, "in order to ensure a fair enquiry", that the Chairman "reconstitute the Commission in light of [these] observations."

On 2 May 1991, the Commission of Enquiry interviewed the WFP staff members whose names had been put forward by the Applicant. According to the record, four of the five staff members described the Applicant as "generally friendly and cordial" and "cooperative and efficient". They also stated that they had knowledge of his "alleged misbehavior with the field staff, particularly the PIOs." The fifth staff member had "reportedly heard nothing adverse against [the Applicant]."

On 7 May 1991, the Applicant met with the Commission of Enquiry. In reply to the charges, he maintained that he was innocent of them, that they were fabricated, and "personally motivated". On 16 May 1991, the Applicant submitted, to the Chairperson of the Commission, statements of retraction from two of the three PIOs who had previously signed statements concerning the Applicant. The statement from the PIO, Modhukhali, dated 19 April 1991, reads as follows:

> "On last 27.3.91 ... WFP Field Officer ... and the [DRRO] told me ... that [the Applicant] was a very bad man and he was engaged in activities which were against the interests of the PIOs. They told me to give statement against [the Applicant]. As a man considered to be working against our interests, I gave a statement against [the Applicant], which is not at all true."

The statement from the PIO, Boalmari, also dated 19 April 1991, reads as follows:

> "On last 27.3.91 ... one WFP Field Officer came to our Office and said that [the Applicant] was working against the interests of the PIOs. He told me to give a statement against [the Applicant]. The statement which I gave against [the Applicant] considering him to be a man against our interests is not at all true."

In its report, dated 19 May 1991, the Commission of Enquiry noted that attempts had been made "to remove the evidence rather than refute it." The report also noted "another case of serious misconduct" involving extortion by the Applicant, which had been "revealed in the course of the investigation," as well as "clear evidence that he has in the past falsified or deliberately overclaimed on travel expenses and almost certainly falsified or forged medical claims." The report's conclusions read, inter alia, as follows:

> "... The Commission, faced with overwhelming evidence of extortion which had been checked and double checked, could not be convinced by any allegation of personal motivation or conspiracy to bring false charges.
>
> ...
>
> Both direct evidence and corroborative evidence overwhelmingly supports the case against [the Applicant].
>
> The Commission of Enquiry felt that a continued employment of [the Applicant] would be incompatible with the code of a conduct of a United Nations staff member."

In a memorandum dated 3 March 1992, the Chairman, UNDP/UNFPA Disciplinary Committee reported to the UNDP Administrator on the conclusions of its review of the allegations against the Applicant. The Committee found, inter alia:

> "...
>
> 1. ... some portion of these statements [against the Applicant] were later recanted and this has cast a doubt as to the motives and intentions of all the parties concerned.

2. There would appear to have been some personality conflicts between [the Applicant] and the other WFP colleagues involved in the case. The Committee believes that the allegations brought against him were possibly tied into this fact ...

3. The Committee also took note of and was puzzled by the fact that the alleged offences, although committed in 1989, were only brought to light in 1991, that is, two years after.

4. Allusion was made to discrepancies in travel claims although no supporting documentation, such as travel authorizations or travel claims, was presented. Hence the Committee considered that this could not be taken into account ...

5. The Committee was concerned to note that the Bangladesh Committee reviewing the allegations was comprised primarily of WFP staff members which should not have been the case, given the prerequisite of impartiality, which is very necessary in such cases.

Given these factors, the Committee has agreed that if there was probable cause, the facts which were presented to it were inconclusive, muddled and occasionally contradictory, rendering it very difficult to prove [the Applicant's] guilt. The Committee therefore recommends that:

i. [The Applicant] be reinstated;
ii. [The Applicant] be transferred to another post without any field responsibility ..."

In a letter dated 12 July 1992, the Resident Representative, UNDP, informed the Applicant, inter alia, as follows:

"The Administrator found that you ... obtained unauthorized payments from third parties ... The Administrator found no evidence of retraction from witnesses of their basic complaints of having paid sums of money to you ... and decided that you are separated from service with effect from today ..."

On 17 May 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision contested is based on muddled and inconsistent evidence and does not take into account letters of retraction submitted by the complainants against the Applicant.

2. The composition of the Commission of Enquiry and its procedures violated the Applicant's right to due process.

3. The charges made against the Applicant were motivated by personal animosity arising from differences of professional opinion.

Whereas the Respondent's principal contentions are:

1. The Applicant was accorded due process and given every opportunity to rebut the allegations against him.

2. The Respondent is free to reject the advice of the Disciplinary Committee, provided his decision is free from prejudice or other extraneous factors.

3. The proceedings were not tainted with prejudice or other extraneous motives.

The Tribunal, having deliberated from 3 to 27 July 1995, now pronounces the following judgement:

I. On 20 March 1991, a telephonic complaint was received stating that the Applicant had obtained bribes from government officials by threatening them with withdrawal or suspension of projects which, by implication, could affect their continued employment. This was followed by preliminary enquiries and the establishment of a Commission of Enquiry, the suspension of the Applicant from duty pending investigation and finally, by convocation of a Disciplinary Committee. The Commission of Enquiry found against the Applicant, but not so the Disciplinary Committee. The Respondent accepted the recommendations of the Commission of Enquiry, rejected those of the Disciplinary Committee and summarily dismissed the Applicant for

serious misconduct. The Tribunal notes that the Respondent, in rejecting the recommendations of the Disciplinary Committee, did not give a proper explanation for doing so. The Tribunal recognizes the wide discretion of the Secretary-General in disciplinary matters. However, because the two bodies convened by the Respondent gave conflicting recommendations, the Tribunal examined all the evidence, in order to determine whether the Respondent's appreciation of the facts, which was the basis for his decision to dismiss the Applicant, was reasonable or not.

II. The Tribunal's review of the evidence is complex because many contradictions of facts, allegations and counter-allegations of malice, intrigues and unworthy motivations are found throughout this case. Moreover, witnesses often seem to be open to being influenced or suborned, and are vague on important details and, not infrequently, are known to each other.

III. The Applicant alleges that the fact of his sister being married to a former President of Bangladesh made him vulnerable in many ways. He claims to be utterly upright, god-fearing, consistently and vehemently professional in giving advice without fear or favour, to enjoy a fine reputation for integrity and competence, and to be indeed above such sordid activities as taking bribes, especially for "pitiable" amounts and from strangers. The argument advanced by the Applicant is that both by nature and by circumstances he is incapable of committing the offences of which he was found guilty.

IV. Be that as it may, one of the Tribunal's main concerns is to ensure that the Applicant was given fair treatment in the process which found him guilty. Thus, the Tribunal has to determine whether the Respondent's action was taken in good faith, untainted by prejudice. It also has to establish whether the Applicant was

given the full protection of the applicable Regulations and Rules. In addition, the Tribunal has to appraise whether the Respondent's action was consistent not only with the proper use of his discretion but also with accepted standards of investigation and with the observance of the Applicant's rights.

V. The preliminary examination by the Head of the Coordination and Programming Unit, who was sent out by WFP to the district of Faridpur to question the local complainants was done, it seems, without the Applicant's direct or official knowledge. Nonetheless, he apparently came to know about it. There is evidence that some of the people who had made complaints against the Applicant subsequently "retracted" any allegation of the Applicant's disloyalty to WFP. The Respondent treats the retractions as not related to the alleged bribe-taking. The Applicant asserts that these retractions can only refer to the allegations of bribe-taking. In any event, he considers these allegations as fabricated and engineered by one of his colleagues and by the Director of Operations, WFP, for their own reasons. The Applicant elaborates at some length on what he believed these reasons were. As for the Director, it was his unpopularity both in the Government of Bangladesh and in WFP, as for the Applicant's colleague, the wish to be promoted. There is very little evidence to sustain these allegations by the Applicant.

VI. The Applicant also questioned the composition of the Commission of Enquiry and in particular, he objected to the inclusion in its membership of a person junior to him in rank and seniority. The Respondent defends this on rather weak grounds i.e. the person objected to was not the Applicant's direct subordinate. The Applicant also points out that the mention of false travel claims etc, was not justified. The Respondent agrees that it should not have been done. Similarly, the Applicant claims that he was deliberately misled by the Respondent about the time-limit for his

appeal (one month instead of two allowed) and the Respondent simply states that it was a human error. On the other hand, all those persons considered by the Applicant as his friends said, on examination, that they were aware of the Applicant's notoriety for accepting bribes, but could not produce any evidence. Only one friend said that the Applicant was not given to any wrong-doing.

VII. These anomalies and contradictions are to be found in every allegation and counter-allegation. In these circumstances, the Respondent concluded, mainly on the basis of the findings of the Commission of Enquiry, that the Applicant was guilty of serious misconduct. There was never any direct confrontation between the Applicant and his three accusers - perhaps there could not be, as they all wished to be "protected" from such untoward consequences as might follow their disclosure. In this connexion, the Tribunal notes the Commission of Enquiry's reference to the evidence before it and its conclusion that:

> "neither in his written statement of ... nor in his meeting with the Commission on 7 May 1991 did [the Applicant] convincingly cast doubt on this key evidence of at least two persons confirming that they had given him bribes."

VIII. On the other hand, apart from the irregularities already mentioned, the Tribunal considers that charging the Applicant with extortion or bribery allegedly committed in 1989 - i.e. two years before the Commission of Enquiry's report - cannot be considered fair. Furthermore the Respondent's argument that the composition of the Commission of Enquiry could not be better balanced is not entirely convincing. Nor has any strong argument been advanced as to why a confrontation between the Applicant and the original three complainants could not be arranged: the conclusion that it might jeopardize the interests of the complainants or might mean negation of the promise of confidentiality given to them are in the realm of speculation.

IX. After an examination of the evidence, the Tribunal is satisfied that the Respondent's use of discretion in dismissing the Applicant can be upheld. However, this case is marked with several irregularities which, while not deflecting the course of justice, entitle the Applicant to some compensation. The Tribunal assesses this compensation to be US$2,000.

X. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount of US$2,000.

(Signatures)

Samar SEN
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 27 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/699
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 699

Case No. 749: LAU-YU-KAN

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mayer Gabay;

Whereas, at the request of Michael Lau-Yu-Kan, a staff member of the International Maritime Organization, hereinafter referred to as IMO, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 August 1993;

Whereas, on 13 August 1993, the Applicant filed an application containing the following pleas:

"II. PLEAS

The Tribunal is requested:

(a) To rule that, in accordance with the procedures laid down in staff rule 102.2, the Applicant's former post should have been reclassified at grade G.5 on the basis of the evaluation made by the Personnel Section some time between 22 November 1988, ... and 21 December 1989 ...

(b) To order the Respondent to pay compensation to the Applicant equal to what he would have received, if he had been promoted to G.5 in his former post with effect from 1 January 1989, ...

(c) To order the Respondent to pay substantial compensation to the Applicant for the dilatory and inconsiderate

manner in which the Administration handled his case and for its failure to apply the procedures set forth in staff rule 102.2."

Whereas the Respondent filed his answer on 31 August 1994;

Whereas the Applicant filed written observations on 23 November 1994;

Whereas, on 4 July 1995, the Tribunal put a question to the Respondent to which he provided an answer on 7 July 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of IMO on 16 April 1981, as a Messenger in the Documents Section of the Conference Division, at the G-2 level, pursuant to a fixed-term appointment through 31 July 1981. The Applicant was granted a probationary appointment, with effect from 1 August 1981. On 1 May 1982, the appointment was converted to permanent, and the Applicant was promoted to the post of Machine Operator, at the G-4 level, in the Printing Section of the Conference Division. With effect from 1 December 1992, the Applicant was promoted to the G-5 level.

On 21 November 1988, the Applicant submitted a job description questionnaire which he had completed as part of his application for reclassification of his post. On 22 November 1988, the Head of the Printing Section forwarded the job description questionnaire to the Head of the Personnel Section with a memorandum of support for the reclassification. In a reply dated 29 November 1988, the Head of the Personnel Section informed the Head of the Printing Section that "Personnel Section will evaluate the grading of the post and you will be informed of the outcome shortly."

In a memorandum dated 21 December 1989, the Head of the Personnel Section informed the Applicant that his post had been reviewed and the existing grade of G-4 had been confirmed. On 20 February 1990, in a memorandum to the Head of the Personnel Section, the Applicant appealed this decision. In a memorandum dated 22 February 1990, the Acting Head of the Personnel Section informed the Applicant that his appeal would be referred to the

Review Committee on Job Classification (RCJC), to be convened "as soon as possible" after the Head of Personnel's return to Headquarters on 26 February 1990.

On 11 February 1991, the RCJC sent its report on a number of appeals, including the Applicant's, to the Secretary-General. The report on the Applicant's case stated that "it was found that the wrong number of points had been inadvertently quoted for Factor III and that the post, which had been confirmed at G.4, should in fact have been upgraded to G.5." The report also noted that "the Second Evaluator, whose values could not be made available to the RCJC, arrived at a total of 117, i.e. well within the G.5 range." The report concluded that the post "should clearly have been graded G.5 when submitted for reclassification" and recommended that the Applicant "be compensated for the prejudice he has suffered."

In a memorandum to the Director of the Administrative Division, dated 21 March 1991, the Chairman of the RCJC expressed concern that no decision had yet been taken on the RCJC recommendations. She noted that the situation was "rather distressing for the staff members concerned" and urged the Director to "give this matter your most urgent attention. In a reply dated 27 March 1991, the Director of the Administrative Division assured the Chairman of the RCJC that "the cases in question are being given the attention necessary" and that the incumbents would be advised of the Secretary-General's decision "in due course".

In a memorandum dated 26 March 1991, the Applicant wrote to the Secretary-General stating that he had been informed by the RCJC Chairman "that an error had been made" in the calculation of the factors relating to classification of his post. He stated that he had "received no word of apology or any kind of communication from the Section involved". He added that "it has now been 2 years and 5 months since I applied for upgrading." In a reply dated 17 April 1991, the Director of the Administrative Division informed the Applicant that the Secretary-General was "carefully considering the [RCJC] report" and that as soon as a decision was made he would be informed.

In a memorandum dated 12 July 1991, the Director of the Administrative Division informed the Chairman of the RCJC that the Secretary-General had been "unable to take any decisions" on the RCJC report and that he had "interviewed the staff members concerned and explained the position to them." He said the Secretary-General would "return to your recommendations as soon as the financial circumstances permit."

In a memorandum to the Director, Administrative Division, dated 15 August 1991, the RCJC acknowledged the financial difficulty "for the Secretary-General to approve the additional expenditure which the upgrading of posts would entail". It suggested, however, that there was no reason "a decision could not be taken in principle on the Committee's recommendations and the incumbents of the relevant posts informed of such decision."

On 14 October 1991, the Head of the Personnel Section informed the Applicant that the RCJC "did not consider it necessary" to review the case, as "an arithmetical error was inadvertently committed by the scrutineers in the Personnel Section." Nevertheless, the Secretary-General had decided "to submit your application (along with other pending cases) for evaluation by an external consultant fully conversant with the common system job evaluation mechanics."

In a memorandum to the Head of the Personnel Section, dated 2 January 1992, the Applicant protested this decision, stating "I do not understand on what basis it is necessary to carry out another review, especially after 3 years have elapsed." He requested that the error be corrected and that he be promoted to the G-5 level, with effect from 28 November 1988.

In a memorandum dated 23 January 1992, to the Head of the Personnel Section, the Chairman of the RCJC also protested the decision to review the Applicant's reclassification request. She recalled that the RCJC report "clearly states that there was no need to review [the Applicant's] post as the factors awarded by both Personnel evaluators made the post a G.5." She noted that "had there not been an arithmetical error, the post would never have been

submitted to the RCJC for review." She also noted that the RCJC recommendation to upgrade the post and compensate the Applicant had been made almost a year earlier and expressed concern over the manner in which the case was being handled. In a reply dated 21 February 1992, the Head of the Personnel Section stated that "once a committee submits its report on a case, it has no further locus therein" and that as the report of the RCJC had been submitted "the responsibility for implementing whatever decision arises herefrom rests with the Administration."

In a memorandum dated 21 February 1992, the Head of the Personnel Section informed the Applicant that while it was true that an arithmetical error had been made in the initial assessment of the language factor (Factor B) for his post, "during the process of a further review of the case it has been discovered that Factor B as applied against 'Knowledge of Languages' was in itself inaccurate." As no knowledge of a second language was required for the post, "factor A should have been applied instead", which would bring the score for the post to a total "below the minimum range for a G.5 grade."

In a memorandum dated 5 March 1992, the Applicant advised the Head of the Personnel Section that he was "absolutely dissatisfied and disillusioned" with the result. He noted that his Head of Section had checked and signed his application for reclassification, and he reviewed the history of its consideration by the RCJC and the Administration. He requested review of his case by the Joint Appeals Board (JAB). On 11 March 1992, the Applicant requested the Secretary-General to review the administrative decision taken by the Head of the Personnel Section, in accordance with staff rule 111.2(a). In a reply dated 18 March 1992, the Head of the Personnel Section informed him that his request was under consideration.

On 13 April 1992, having received no reply to his request, the Applicant lodged an appeal with the JAB.

The JAB adopted its report on 28 January 1993. Its recommendations read as follows:

"RECOMMENDATIONS

5.1 The JAB recommends that the post which is the object of the appeal be classified at grade G.5.

5.2 The JAB recommends that this upgrading be backdated to 1 January 1989, since that was the year in which the request made in 1988 was originally considered; the choice of such a date seems to be consistent with standard IMO practice.

5.3 The JAB recommends that a compensation be granted to the Appellant for the delays and lack of consideration that he suffered. Having heard from the Respondent that such compensation is usually awarded at the rate of one week's salary for each month of extra delay, the JAB recommends that such a payment be calculated from 21 December 1989, the date on which the request for an upgrading was first turned down."

On 27 April 1993, the Secretary-General transmitted to the Applicant a copy of the JAB report and informed him that he had decided "not to approve the recommendations contained therein."

On 13 August 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Although the original evaluation of the duties and responsibilities of the Applicant's post made by the Personnel Section, if correctly interpreted, should have resulted in the upgrading of his post, no action was taken to give effect to the upgrading.

2. The Administration failed to follow the procedures in the staff rules applicable to the Applicant and handled the Applicant's case in a dilatory and inconsiderate manner.

Whereas the Respondent's principal contentions are:

1. The Respondent has complied with the procedural requirements of the staff rules and of due process. His exercise of discretion in regard to the classification of the Applicant's post was reasonable and lawful.

2. The Applicant suffered no damages in the proceedings, or from the allegedly protracted nature of the classification proceedings, and is entitled to no compensation.

The Tribunal, having deliberated from 3 to 27 July 1995, now pronounces the following judgement:

I. In November 1988, the Applicant requested the reclassification of his post to the G-5 level. His request was rejected. On 20 February 1990, the Applicant appealed to the Review Committee on Job Classification (RCJC). The RCJC convened a year later and submitted its report on 11 February 1991. Its chief conclusion reads as follows: "It was found that the wrong number of points had been inadvertently quoted for Factor III and that the post, which had been confirmed at G-4, should in fact have been upgraded to G-5 ... It was decided that there was no need for the Committee to review Post n° 238, since it should clearly have been graded G-5 when submitted for reclassification ...". The Administration took no action on the RCJC conclusions. The Respondent later admitted that this was due to financial reasons, but did not communicate this to the Applicant. The Applicant was simply informed, on 17 April 1991, that the Secretary-General was "carefully considering" the RCJC's report.

II. In the words of the JAB, the error detected by the RCJC originated as follows:

> "4.1 ... The two evaluators consider seven factors to which they assign a letter rating according to their reading of the answers provided by the staff member on his job description questionnaire. Then they convert these letters into figures according to a set mathematical formula, and finally compare the resulting total to the ranges of points required for each grade. A grade G.4 falls within the range 75-104 points and a grade G.5 in the range 105-134 points.

4.2 In the case of the Appellant's G.4 post, one evaluator who had given factor three (knowledge of languages) a B rating, came up with 103 points. The other evaluator came up with 117 points, but even though this total is known, its components are not since the actual grading sheet has been lost. Following this exercise, the Director, Administrative Division, recommended to the Secretary-General not to upgrade the post to G.5.

4.3 When the case was referred to the RCJC, that committee discovered that a mistake had been made in the surviving evaluation sheet: the rating B given for knowledge of languages should have been converted to a figure 10 (instead of the number 6 actually given), in which case the total of 103 would have been increased to 107. The RCJC then concluded that since both evaluators arrived in fact at a total above 105, the post should be a G.5, and that it should not have been sent to the RCJC in the first place."

III. In the Tribunal's view, the Administration should have reclassified the post as soon as it was informed of the existence of this mistake. The review procedure, as far as reclassification of posts is concerned, is set forth in staff rule 102.2. Paragraphs (i) and (j) of that rule stipulate that the RCJC will submit its recommendations to the Secretary-General and that the Secretary-General's decision shall be final. These provisions apply to the outcome of a review procedure. This procedure, however, was not followed since the RCJC stated in its report dated 11 February 1991 "that there was no need for the Committee to review ... the post ... since it should clearly have been graded G-5 when submitted for reclassification ..."

As a result, paragraph (j) of staff rule 102.2 was not applicable and the Secretary-General was not free to accept or refuse reclassification. Nevertheless, the Secretary-General decided to avail himself of the services of an outside consultant who was to examine the Applicant's case alongside with others. However, this did not materialize. Some time later, a new mistake was allegedly discovered in the rating of the post. On 21 February 1992, the Applicant was informed that "during the process of a further review of the case by the Personnel Evaluators it has been discovered that Factor B as applied against 'Knowledge of Languages'

was in itself inaccurate. This discovery has arisen on considering that the performance of the duties attached to the post under reference does not require the knowledge of a second IMO working language. This means that Factor A (5 points) should have been applied instead."

IV. As a consequence, the Applicant's post was again considered as not being at the G-5 level. The Applicant appealed this decision to the JAB. The JAB found in favour of the Applicant and recommended the retroactive reclassification of his post to the G-5 level, as well as compensation. The Secretary-General decided not to accept the JAB's recommendation. He did not, however, specify the reasons for his refusal. The Applicant then appealed to the Tribunal.

V. With respect to the issue of the language requirement and the other issues before the JAB, the Tribunal fully concurs with the JAB's findings and shall base its judgement on them. The findings are set forth below.

> "4.4 A year later, the Respondent explained that, in fact, the wrong letter rating had been used for factor three, as the knowledge of a second IMO language was not required for the post. Instead of a B = 10, the evaluator should have used A = 5, the total being thus 102, which was below the minimum range for a G.5. The other evaluator's score of 117 was not mentioned.
>
> 4.5 Without repeating the whole evaluation exercise, the JAB felt that it should scrutinize the figures because of the mistakes made. At the formal meeting of 14 December 1992, it asked the Respondent how two evaluators' totals were normally reconciled if they were very different. The JAB was told that, in such a case, the decision would tend to be positive if the figures leant towards the positive side and vice versa.
>
> 4.6 Applying this principle to the present case, the JAB considered that 117 points were certainly noticeably higher than the floor value for G.5 and that 103 or 102 were practically at the ceiling of the G.4 range, which should point towards a positive decision. Even if the mistake attached to the language factor was eliminated, and the 117

score was reduced by substituting an A = 5 rating for the B = 10 rating presumably given by the second evaluator to that factor, the result in a score of 112 would still pull the decision in the direction of an upgrade.

4.7 To illustrate these different alternatives, the JAB then proceeded to average the corresponding totals of the two evaluators. The JAB first averaged the undisputed score of 117 given by one scrutineer with the original wrong score of 103 given by the other (average = 110), then with the score of 107 as per the suggestion of the RCJC (average = 112), and then with the score of 102 as corrected by the Respondent (average = 109.5). In those three cases, the average was well above the G.5 floor value.

4.8 Having reduced the 117 score of the second evaluator to 112 by applying the A = 5 rating instead of the B = 10 presumably used, the JAB then averaged that 112 score with the lowest score of the other scrutineer. That worst case scenario, which discounted the factor 'knowledge of languages', gave an average figure of 107, which is still within the G.5 range.

4.9 Again the JAB did not make these calculations in an attempt to evaluate the post itself but simply analysed the figures arrived at during the evaluation process as a necessary precaution since two errors had been made, the latter annulling the first one. The JAB could not understand why the higher score of 117 given by one evaluator had not been taken into account either in the initial assessment or in the further review made by the Personnel Section. That score which had been given by an experienced scrutineer could be expected to carry as much weight as the lower score. The JAB noted that the 117 score was not mentioned at all in the Respondent's memorandum of 17 December 1992 which described the second examination of February 1992 as a mere 'review' that did not require the conduct of two new evaluations. The JAB felt that, even if a mere review was justified, it should not have been confined to the checking of the score of only one evaluator, without taking the other score into account as if it had never been given. Even though the other evaluation sheet had been lost, an enquiry could have been made as to how the other evaluator's score had been arrived at.

4.10 At the formal meeting, the Respondent said that the evaluation process was not a purely arithmetical exercise and that the figures obtained were not meaningful by themselves since a number of considerations were taken into account, such as the principle of 'rationality'. This view was emphasized in the memorandum of 17 December 1992 which stated that there was no 'mechanical' relation between the numerical score of the evaluators and the grading of a post. This memorandum referred to a process called the 'coherence test'

which also played a part in deciding whether a post should be upgraded or not, and which was said to be in keeping with the definition of the evaluation system given in staff rule 102.2(1).

4.11 With specific reference to staff rule 102.2(1), the JAB noted that no other considerations relevant to that rule had been invoked all along the grading process. Only the scoring figures were given prominence on the evaluation sheet (...) which stated:

> 'As 103 ranges between 75 and 104 and is equivalent to classification level III on the conversion table, the grade is confirmed at G.4.'

That was a mechanical and straightforward conclusion that excluded any other element.

...

4.13 It is significant that, as late as 21 February 1992, in the letter addressed to the Appellant by the Head, Personnel Section (...), there appears to be no doubt that the determining element that made the post a G.4, as opposed to a G.5, was the actual point count: 'In view of this development, the actual result of your scores is shown as 102, being 3 points below the minimum range for a G.5 grade.' No other reason was given for this grading.

4.14 In the whole correspondence the JAB was unable to find any reference to other considerations that might have been relevant once the letter ratings were given. Looking for the 'subsequent evidence, which constitutes a more in-depth review of the post classification' as mentioned in the Respondent's memorandum of 17 December 1992, the JAB could not find any hint of such considerations except in the statement made by the Respondent at the formal meeting and in that memorandum, i.e. some three years after the initial assessment. If such other considerations were indeed important, they could be expected to have been taken into account when the letter ratings were assigned; if overlooked at that stage, they then should have been mentioned soon after in the evaluation process. The question could be raised as to whether the 'coherence test' or the principle of 'rationality' were invoked as an afterthought, after the completion of the process, to justify the decision taken. At any rate, these concepts were not described or defined in the available submissions.

4.15 The JAB therefore found it difficult to take into account considerations that had apparently played no part in the grading process of the Appellant's post up to February 1992; that process had solely relied on figures, once the

letter ratings had been assigned by the evaluators according to their judgement based on any number of criteria. Besides, no matter how the figures were calculated and whether minimizing or not the importance of the language requirement, it was clear, if one used the scores of the two evaluators, that the Appellant's post should have been upgraded in 1989 when his request was first considered."

In consequence of the JAB's findings and reasoning, the Applicant's post should have been classified at the G-5 level.

VI. In view of the foregoing, the Tribunal orders the Respondent to pay to the Applicant the difference between what the Applicant earned and what he would have earned had he been promoted to the G-5 level, with effect from 1 January 1989 as well as the amount of $1,500 as compensation for delay and lack of consideration in the handling of his case.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mayer GABAY
Member

Geneva, 27 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

AT

UNITED
NATIONS

Administrative Tribunal

Distr.
LIMITED

AT/DEC/700
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 700

Case No. 767: BENTHIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 10 November 1993, Natasha Benthin, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, filed an application requesting the Tribunal:

> "(a) ... to recognize that the decision not to extend my one-year fixed-term appointment with UNEP is made outside the established rules and procedures of the United Nations. ...
>
> (b) To confirm that the decision not to extend my contract was motivated by prejudice.
>
> (c) To establish mala fides on the part of UNEP's management in their non-observance of correct evaluation procedures, and in denying me due and fair process according to the established rules and procedures of the United Nations.
>
> (d) To acknowledge, in accordance with the unanimous judgement of the Joint Appeals Board, that expectations of an extension of my appointment were indeed created by UNEP.
>
> (e) ... to order my re-instatement with UNEP for eight months and twenty days. ...
>
> (f) To recognize the specific responsibility of the four signatories to the 'report on short-term staff' for having evaluated my performance in an arbitrary manner outside the

established norms, rules and procedures of the United Nations, and thus having prejudiced any future career I may have had with the UN.

(g) To order action to be taken by the Secretary-General, in accordance with rules 110.1 'Misconduct' and 110.3 'Disciplinary measures' of the 100 Series Staff Rules (as amended) against the 4 signatories to the report on short-term staff, which led to an unjust and incorrect decision not to extend my appointment. ...

(h) To order UNEP to open my personnel file for clearance of any documentation adverse to me, ... filed without my knowledge, and ensure that my responses to the drafters are attached wherever applicable.

(i) To rescind the decision of the Secretary-General not to compensate me for UNEP's maladministration of my case, and to order the payment of net base salary in General rates from 11 April 1993, when my contract expired, until the date of re-instatement in UNEP. ...

(j) If, ..., UNEP is unable to re-instate me, to compensate me [for the loss of my] net base salary in Nairobi rates for the eight months and twenty days that I would otherwise have worked.

(k) To compensate me for the delay in holding a Joint Appeals Board meeting due to misleading advice by UNEP."

Whereas the Respondent filed his answer on 11 July 1994;

Whereas the Applicant filed written observations on 23 September 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNEP on 11 April 1992, as an Associate Fund Management Officer at the P-2 level, on a one year fixed-term appointment. On 10 April 1993, the Applicant separated from UNEP, upon the expiration of her appointment.

In a letter dated 18 September 1992, the Chief, Fund Programme Management Branch (FPMB), expressed his concern to the Applicant that the Senior Fund Management Officer had requested, in a memorandum of 8 September 1992, to be relieved of responsibility for training the Applicant. He expressed concern that "after nearly

six months in the Fund you have not managed to grasp the basics of the job" and urged her "to concentrate on acquiring the necessary skills required to fulfill your responsibilities as a Fund Management Officer." In a lengthy reply, dated 6 November 1992, the Applicant set forth "the obstacles I have confronted and overcome during my past 6 months."

In a report on short-term staff, signed by the Applicant's supervisor, the Chief, FPMB, on 29 October 1992, and by the Chief of the Division on 30 October 1992, the Applicant was given an overall rating of "fair". No extension of her contract was recommended. The report was neither shown to nor discussed with the Applicant. In a letter dated 13 November 1992, the Chief, Personnel Section, informed the Applicant that UNEP did not intend to extend her fixed-term appointment upon its expiration on 10 April 1993.

In a letter dated 18 November 1992, to the Chief, Personnel Section, the Applicant sought clarification of the basis for the decision regarding her appointment, as no evaluation of her performance had been made. She also asked for information on the recourse procedures available. In a reply dated 20 November 1992, the Chief, Personnel Section, informed the Applicant that "the decision on the non-extension of your fixed-term appointment was taken on the basis of an interim report which rates your performance during the period 11 April 1992 through 31 October as 'Fair', i.e. 'less than good'". With regard to procedure, he noted that expiring contracts were generally extended until 31 December, to accommodate the annual UNEP Management review in May/June of all appointments expiring in the current year. Therefore, he explained, "As your contract is due to expire on 10 April 1992 [sic] it was deemed necessary to recommend an extension beyond this date. But before doing so we had first to request for an interim short-term report on your performance to justify our recommendation." Based on the overall rating of "Fair", he stated "it was not possible for the Management to grant you an interim extension."

In a memorandum dated 4 December 1992, the Applicant informed the Chief of Personnel that she wished to rebut the mid-term

evaluation report. On 6 December 1992, she sent a telefax to the Director of Personnel, questioning the validity of the mid-term evaluation report as a basis for the decision against her. She noted that the report in that form was intended for short-term staff only, that it had not been shown to her as required by staff rule 112.6, and that the rating indicated an arbitrary judgement without explanation. On 11 December 1992, the Applicant requested the Executive Director of UNEP to rescind the decision on her appointment, as "the form, content and the resulting decision is made outside the norms, procedures and rules of the Secretariat, ...".

On 31 December 1992, the UNEP Chief of Personnel advised the Applicant to "urgently inform Personnel in writing of your decision to rebut the short-term report". He wrote to the Applicant on 6 January 1993, that the UNEP Administration "could find no strong justification to change the decision taken earlier". He again advised the Applicant "to exercise your right to rebut the short-term report in accordance with established procedure," so that the investigation could take place prior to the expiration of her fixed-term appointment. On 25 January 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 26 January 1993, a Personnel Officer in the Office of Human Resources Management (OHRM), advised the UNEP Chief of Personnel that "although you have offered staff member the opportunity to rebut the short-term PER, it would perhaps be better to prepare a full report which the staff member can rebut, if she so wishes, in accordance with ST/AI/240/Rev.2." He also suggested, "you may wish to review matter of extension or non-extension" and that such procedure "should be completed and staff member informed prior to expiration of her current appointment on 10 April 1993".

On 29 January 1993, the UNEP Chief of Personnel sent a performance evaluation report (PER) form to the Applicant for completion. In a memorandum dated 2 February 1993, the Applicant informed the UNEP Chief of Personnel that "pending the outcome of

the appeal, it would be inappropriate to proceed with the preparation of another report." In a reply dated 5 February 1993, the Chief of Personnel expressed surprise at the Applicant's refusal to complete the PER. On 8 February 1993, the Applicant clarified that she had not refused to complete the PER but rather had asked whether to do so would be appropriate while her appeal against the evaluation report was pending. On 9 February 1993, the Chief of Personnel noted that it was the Applicant's decision not to complete the PER and not to rebut the report.

On 30 March 1993, the Executive Director advised the Applicant that a completed PER was necessary for JAB consideration of her case. He requested that she complete her section of the PER, in the interest of resolving the matter without further delay. The Applicant completed her section of the PER on 6 April 1993. In a memorandum dated 7 April 1993, she informed the Chief, Personnel Section, that this report "should have been submitted half a year ago, i.e. <u>at the time the decision was made not to extend my contract.</u>" On 7 April 1993, the Applicant's supervisor completed his section of the PER. On 8 April 1993, the second and third reporting officers completed their sections. On 10 April 1993, the Applicant separated from service.

On 15 July 1993, the JAB adopted its report on the Applicant's appeal. It concluded and recommended as follows:

> "25. In conclusion, the Panel finds that the decision not to extend the appellant's contract was faulty on procedural grounds, for two main reasons:
>
> (a) The short-term report is inappropriate for the purpose of recommending against a staff member's extension, as it has no provision for rebuttal;
>
> (b) The UNEP procedures for reviewing fixed-term appointments, in the form and content communicated to the appellant in the letter of 20 November 1992, are irrelevant to the case, and led to a wrong conclusion on the part of the appellant.

26. The Panel specifically recognized the authority of UNEP Management to take decisions on non-extension of contracts for reasons of inadequate performance, provided these decisions are taken fully in accordance with its own procedures, and the provisions of staff rule 104.12(b) regarding fixed-term appointments.

27. Consequently, the Panel recommends that

(a) UNEP make a compensatory payment to the appellant, in the amount equivalent to an extension of her contract through 31 December 1993;

(b) both the short-term report and the PER not acknowledged by the appellant, be withdrawn from her personal status file."

In a letter dated 11 August 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her, inter alia, as follows:

"The Secretary-General has examined your case in the light of the Board's report and has decided to reject the recommendation in paragraph 27 [(a) - see above]

Under staff rule 104.12(b), fixed-term contracts do not carry any expectancy of renewal, whether or not the performance of the staff member is satisfactory. In this particular case you also were given notice of non-renewal of your contract well in advance of its expiration.

The Secretary-General has approved the part of the recommendation in the paragraph 27 [(b) - see above]

Because there were procedural shortcomings in the process of evaluating your performance, he has decided to accept the recommendation of the Board."

On 10 November 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to extend the Applicant's appointment was made on the basis of a performance report intended for short-

term staff only, which was not shown to her before the decision was made. This constituted a violation of ST/AI/240 Rev.2, UNEP/EDB/90/11/Rev.1, and staff rule 112.6.

2. The failure to comply with procedural requirements concerning the evaluation of the Applicant's performance and the decision not to renew her appointment constitutes maladministration, which should be subject to disciplinary action.

3. The Applicant was a victim of prejudice and mala fides.

Whereas the Respondent's principal contentions are:

1. Outstanding performance does not create a legal expectancy to further employment with the Organization. A fortiori, a staff member involved in ceaseless disputes with her colleagues during her first year fixed-term appointment cannot have a legal expectancy to further employment.

2. The Applicant's performance was later properly appraised and, given the results of that appraisal, no compensation should be payable in respect of the procedural irregularities that occurred in connection with the first PER.

3. The Applicant's terms and conditions of employment do not give her any right to require that disciplinary action be taken against other staff members.

The Tribunal, having deliberated from 28 June to 27 July 1995, now pronounces the following judgement:

I. This is an appeal from a decision by the Secretary-General, dated 11 August 1993, rejecting the JAB's recommendation that the Applicant be compensated "in the amount equivalent to an extension of her contract through 31 December 1993". The Respondent did, however, approve the JAB's recommendation that "both the short-term report and the PER not acknowledged by the Applicant be withdrawn from her personnel status file".

II. The Applicant's principal contention before the Tribunal is that the non-renewal of her appointment was based solely on the initial performance evaluation report (PER), which was defective both in form and in substance. In addition, the Applicant alleges that she had an expectation of renewal. The Applicant seeks reinstatement in her post, as well as the compensation recommended by the JAB.

III. Regarding the Applicant's expectation of renewal, the Tribunal agrees with the Respondent's legal argument; there was no right to or legal basis for the Applicant's expectation. The Applicant was serving on a one year fixed-term appointment, which was subject to the conditions specified therein, and in the Staff Regulations and Rules. Staff rule 104.12(b) provides that:

> "The fixed-term appointment does not carry any expectancy of renewal or conversion to any other type of appointment."

A statement on non-expectancy of renewal was also expressly included in the Applicant's Letter of Appointment.

In addition, the Tribunal has consistently held that employment with the United Nations ceases on the expiration date of a fixed-term appointment and that a legal expectancy of renewal would not be created by efficient or even outstanding performance (Cf. Judgements No. 173, Papaleontiou (1973); No. 205, El-Naggar (1975); No. 368, Roy (1986); No. 427, Raj (1988); No. 440, Shankar (1989).

IV. As part of her claim, the Applicant asserts that the non-renewal of her appointment was motivated by prejudice and mala fides on the part of UNEP's management. In this respect, the Tribunal has held:

> "... The Tribunal's jurisprudence has consistently maintained that while, under the Regulations and Rules governing fixed-term contracts, the Respondent has the unquestioned right to terminate such contracts, it must nevertheless be ensured

> that the decision to terminate must not be tainted by caprice, prejudice, falsehood or any serious lack of due process." (Cf. Judgement No. 345, Najjar (1985)).

The burden of showing that prejudice or other improper motivation was the basis for decisions taken by the Respondent lies with the Applicant. It has been determined that:

> "Under the Tribunal's consistent jurisprudence, the burden of proving prejudice or other improper motivation rests with the Applicant". (Cf. Judgement No. 465, Safavi (1989).

Upon reviewing the file in this case, the Tribunal finds that the Applicant has failed to meet the required burden of proof; the evidence does not establish that the non-renewal of her appointment was motivated by prejudice or any other improper motivation on the part of the Respondent. On the contrary, the record shows a continuing series of problems created by the Applicant's difficulties in maintaining harmonious relations with her colleagues. It also shows that this unsatisfactory aspect of her performance had been called to her attention by her supervisors. The Applicant did not have responsibilities of a supervisory nature with respect to her colleagues, but seems to have offended them frequently by acting as if she did.

This case is therefore distinguishable from cases such as that of Beg rendered today (Judgement No. 702), where the Applicant did have such responsibilities.

V. The Tribunal believes and the Respondent does not deny that procedural errors occurred in the preparation of the Applicant's initial PER. However, the Tribunal considers that whatever the faults in the procedure in preparing the initial PER, the fact remains that the Applicant's performance was considered deficient. This conclusion is not without support in the record.

VI. However, the Tribunal notes that the procedural errors admitted by the Respondent in connection with the Applicant's

initial PER injured the Applicant in that she was deprived of the opportunity to submit a rebuttal. The subsequent PER, having been prepared only following her appeal to the JAB, was, as a practical matter, not subject to effective rebuttal. Accordingly, the Tribunal orders the Respondent to pay to the Applicant, as compensation, the equivalent of three months of her net base salary at the rate in effect on the date of her separation from service.

All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 27 July 1995

B. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/701
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 701

Case No. 763: KHUBCHANDANI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 5 February 1988 and again on 13 April 1988, Jairam G. Khubchandani, a staff member of the United Nations Development Program (hereinafter referred to as UNDP), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 30 September 1988, 15 June 1990, 30 September 1990, 31 March 1991, 30 November 1991, 28 February 1992, 31 May 1992, 31 August 1992, 31 July 1993, and 31 October 1993;

Whereas, on 28 October 1993, the Applicant, after making the necessary corrections, filed an application which, after requesting the Tribunal to take certain decisions on its competence and procedures, requests the Tribunal:

> "(a) To find that the management of UNDP did not act in good faith by refusing to make good the commitment to review the Applicant's performance within the one year that he was assigned to a new section;

(b) To find that Applicant's within grade increment was unjustly withheld and that the procedures involved in withholding the increment did not follow procedural norms and therefore denied him his due process rights;

(c) To find that this mismanagement of his increment has proven prejudicial to his career;

(d) To find that, in the process of investigation reviewing the case, the JAB failed to exercise its jurisdiction and therefore;

(e) To find that the JAB proceedings and final recommendations are invalid since the Board did not fulfil its obligation in addressing the substance of the appeal properly before it;

(f) To find that the implications of the recommendation made by the Joint Appeals Board, without addressing the substance of the appeal, constitutes violation of due process and further erodes the confidence in an already faltering appellate system;

(g) To order the Respondent to rescind his decision to deny the Applicant the increment and further;

(h) To award the appropriate amount of compensation payable to him for the one year increased increment as well as any the Tribunal deems appropriate and for the injury sustained by him from the lack of due process and the irreparable damage done to his career;

(i) To order that he be given serious consideration for a retroactive promotion;

(j) Or to award appropriate compensation in lieu of a promotion."

Whereas the Respondent filed his answer on 25 May 1994;

Whereas the Applicant filed written observations on 25 July 1994;

Whereas the Applicant amended his pleas and submitted additional documents on 17 May 1995;

Whereas, on 12 July 1995, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP in India, on 21 December 1967, as a Secretary/Stenographer in the International Recruitment Section. On 2 February 1981, the Applicant was transferred to the Programme Section, as Secretarial/Programme Assistant. On 21 November 1983, he was transferred to the Customs and Travel Section, as Customs and Travel Assistant.

On 23 January 1981, the Applicant was informed that he would be transferred from the International Recruitment Section to the Programme Section. In a letter dated 27 January 1981, to the UNDP Resident Representative, the Applicant expressed concern over the transfer, noting his "keen desire to specialize and develop my skills in International Recruitment". He pointed out that Office Circular 582, of 5 September 1980, stated that the wishes of staff members would be taken fully into account with respect to their redeployment, and he stated: "[I] trust you will give me the opportunity of remaining in the International Recruitment Section."

On 2 February 1981, the Applicant was transferred to the Programme Section, as Secretarial/Programme Assistant. In his performance review and staff development report (PRR), covering the period from January 1980 through January 1981, the Applicant was given an overall rating of a "competent and well-qualified staff member whose performance meets expected standards." In a comment on the report, dated 2 September 1981, the Resident Representative noted:

> "[The Applicant] should be encouraged to develop his skills in programming in order to become [a] more versatile staff member. It is recommended that in about one year's time staff member's work should be further evaluated to determine whether he should continue in programming or be assigned to other work."

The Applicant was next evaluated in a PRR he received on 24 June 1983, covering the period February 1981 through January 1983. He was given an overall rating of a "staff member whose performance does not meet expected standards in all respects." On

21 July 1983, the Applicant submitted a rebuttal to the PRR. On 19 September 1983, an ad hoc panel was appointed to consider the Applicant's rebuttal.

On 16 September 1983, the Resident Representative informed the Applicant that his within-grade salary increment, due from 1 October 1983, would not be granted because his performance did "not meet expected standards." On 19 September 1983, the Applicant lodged an appeal with the Joint Appeals Board (JAB), regarding his PRR and the decision to withhold his within-grade salary increment.

On 29 September 1983, the ad hoc panel considering the Applicant's rebuttal submitted its report to the Resident Representative, concluding that the ratings were fair and should stand. The panel also noted that a review of the Applicant's performance one year after he joined the Programme Section, although not stipulated in the UNDP Personnel Manual, would have given the Applicant a more appropriate indication of the standards required of him by the Section.

On 30 September 1983, the Applicant contested the recommendation not to grant him his within-grade salary increment, due 1 October 1983. On 21 December 1983, the Applicant again lodged an appeal with the JAB.

On 17 August 1984, the Senior Policy Officer (Legal), Division of Personnel, UNDP, advised the Applicant that the report of the ad hoc panel to investigate his rebuttal of his PRR had been considered and its findings and recommendation upheld. In a letter of the same date, he also requested the Resident Representative to appoint an ad hoc panel to investigate the Applicant's rebuttal of the recommendation to withhold his within-grade salary increment which would been due 1 October 1983. This panel was appointed on 12 September 1984. On 17 October 1984, the Assistant Resident Representative informed the Applicant that he had been awarded a within-grade salary increment, with effect from 1 October 1984.

On 1 February 1985, the panel to investigate the withholding of the Applicant's within-grade salary increment submitted its report to the Resident Representative. It concluded that although

the notice requirement and the special report format set forth in Section 20704 of the UNDP Personnel Manual had not been strictly adhered to, the Applicant's interest had been respected in terms of the process and the recommendation to withhold the increment should stand. On 22 April 1985, the Senior Policy Officer (Legal), Division of Personnel, UNDP, informed the Applicant that the panel's recommendation had been accepted.

On 22 October 1987, the JAB adopted its report on the Applicant's appeal. Its conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 42. The Panel concludes that there was no indication that the Administration was influenced by prejudice or some other extraneous factors in preparing the appellant's PRR covering the period February 1981 to January 1983 and in withholding the appellant's within-grade salary increment which fell due on 1 October 1983.
>
> 43. The Panel also concludes that although the Administration did not strictly comply with the requirements of the two-month prior notice and the format of the special report called for in Volume I of UNDP Personnel Manual, the appellant was accorded due process.
>
> 44. Accordingly, the Panel makes no recommendation in favour of the appeal."

In a letter dated 22 December 1987, the Assistant Secretary-General for Human Resources Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had decided "to maintain the contested decisions and to take no further action on your appeal."

On 5 February 1988, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration failed to honour its commitment to the Applicant that within one year following reassignment, his work

would be reviewed to determine whether he should continue or be reassigned elsewhere.

2. The decision of the Administration to withhold the Applicant's within-grade salary increment was not made in accordance with the applicable staff rules, which require two months' notice and a special report.

Whereas the Respondent's principal contentions are:

1. Assignment of the Applicant to a new post was within the discretionary authority of the Administration and did not violate his rights.

2. The preparation of the Applicant's PRR, covering the period from February 1981 to January 1983, and the decision to withhold his within-grade salary increment, due on 1 October 1983, were not vitiated by prejudice or any other extraneous factors.

The Tribunal, having deliberated from 12 to 27 July 1995, now pronounces the following judgement:

I. In the pleas submitted to the Joint Appeals Board (JAB), the Applicant challenged his performance review and staff development report (PRR) covering the period from February 1981 to January 1983. He also challenged the withholding of his within-grade salary increment due on 1 October 1983 and requested the removal of his challenged PRR from his official status files. During the course of the proceedings the Applicant submitted other pleas to the Tribunal. Although it is not altogether clear whether his pleas before the Tribunal fully coincide with his pleas before the JAB, the special circumstances of the case justify resolving any doubts in the Applicant's favour. The Tribunal will therefore address all of the Applicant's pleas.

II. The Applicant claims that the management of UNDP did not act in good faith by refusing to make good its commitment to review the

Applicant's performance within one year of his assignment to a new section. In addition, the Applicant claims that his within-grade salary increment was unjustly withheld and that the decision to withhold the increment was not made in accordance with procedural requirements and therefore denied him due process as well as proving prejudicial to his career. He requests that appropriate compensation be awarded to him due to injury he sustained from the lack of due process and the irreparable damage done to his career.

III. The central issues in this case are whether the preparation of the Applicant's PRR was influenced by prejudice or some other extraneous factors, and whether withholding the Applicant's within-grade salary increment, as a result of his unsatisfactory performance, violated his rights.

IV. The Tribunal agrees with the Respondent that the reassignment of the Applicant to a new post was within the discretionary authority of the Secretary-General. Staff regulation 1.2 states:

> "Staff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations."

V. The Tribunal notes that a staff member's career aspirations must be considered when reassignment is contemplated, and appreciates that the Applicant had the motivation and initiative to take positive steps to advance his career in the International Recruitment Section, the Section in which he wished to remain. However, ultimately, the best interest of the Organization must prevail when reassignments are determined. These two factors are explicitly referred to in office circular No. 582, on reassignment of staff:

> "... Nevertheless, the wishes of the staff in this regard will be taken fully into account in the deployment of staff members to the various sections in the best interests of the Organization."

The Tribunal considers that the Applicant's transfer was made in good faith and was seen by the Administration as potentially beneficial for both the Applicant and the Organization.

VI. The Applicant argues that his performance report should have been produced within a year. The Tribunal accepts that there was a recommendation that "in about one year's time" the Applicant's work should be evaluated. This evaluation was carried out one year and nine months later; the Tribunal considers that this time frame was reasonable. There is no legal basis for asserting that the evaluation of the staff member's work must have been undertaken exactly after one year. In fact, the UNDP Personnel Manual (section 20701) provides that a PRR should be prepared "every two years for staff members holding permanent appointments".

VII. The Applicant claims that by not following proper procedure, the Administration denied him his due process rights. The Tribunal agrees that the Administration did not strictly comply with the procedural requirement of two-months prior notice when withholding within-grade salary increments, as set forth in the UNDP Personnel Manual (section 20300 paragraph 5.0). For this, he is entitled to some compensation which the Tribunal assesses at $1,500.

VIII. Th Tribunal notes that there is a procedure for recourse if a staff member believes his PRR is unjustified. The Applicant was given ample opportunity to challenge the findings of the Administration. In this respect, the Tribunal finds that the Applicant's due process rights were not denied.

IX. The Tribunal does not accept the Applicant's claim that the withholding of his increment was prejudicial to his career and caused irreparable damage to his chances for advancement. The Applicant himself submits in his application "that one year later the Applicant's increment was approved and he was subsequently transferred to another section with much better evaluation results".

X. As the Tribunal is of the view that the Applicant has failed to prove prejudice or improper motivation on the part of the Administration, or the existence of any other extraneous factors which would engage the responsibility of the Organization, it considers that there is no basis for or merit in his claim. (Cf. Judgement No. 93, Cooperman (1965)).

XI. Based on the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant $1,500 with respect to the procedural failure related to notice of withholding the within-grade salary increment. The Tribunal rejects all other claims.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 27 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary